

EV 06-0150-C Y/H Dillbeck v Whirlpool Corp  
Judge Richard L. Young

Signed on 07/24/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

ANNA DILLBECK,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 3:06-cv-00150-RLY-WGH
	)	
WHIRLPOOL CORPORATION,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

ANNA DILLBECK,	)	
Plaintiff,	)	
	)	
vs.	)	3:06-cv-150-RLY-WGH
	)	
WHIRLPOOL CORPORATION,	)	
Defendant.	)	

**ENTRY ON PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Anna Dillbeck (“Plaintiff”), brought the present suit against her former employer, Whirlpool Corporation (“Defendant”), as a result of her removal from Defendant’s millwright apprenticeship program. Plaintiff alleges that her removal from the program constitutes interference and retaliation under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq. (“FMLA”) and failure to accommodate and disparate treatment under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”). Plaintiff now moves for partial summary judgment on her FMLA claims. Defendant moves for summary judgment on all of Plaintiff’s claims. For the reasons set forth below, the court **DENIES** Plaintiff’s motion and **DENIES** Defendant’s motion.

**I. Statement of Facts**

**A. Background**

1. Defendant is a manufacturer of major home appliances. (Defendant’s Supporting Brief at 1). It has a manufacturing facility in Evansville, Indiana. (*Id.*).
2. Defendant’s Evansville facility is unionized, and a Collective Bargaining Agreement

(“CBA”) exists between Defendant and the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, Local 808 (“Union”). (*Id.*)

3. Plaintiff was hired by Defendant on April 9, 2001. (Defendant’s Answer to Interrogatory 7(a), Plaintiff’s Ex. A7).<sup>1</sup>
4. Plaintiff’s first position was in Tubing Production, where she worked until August 2001. (Defendant’s Answer to Interrogatory 7(b)).

**B. Defendant’s Millwright Apprenticeship Program**

5. Defendant offered a number of apprenticeship programs to its employees, including one as a millwright. (Deposition of Anna Dillbeck (“Plaintiff Dep.”) at 80, Plaintiff’s Ex. B and Defendant’s Ex. 3).
6. A millwright installs and maintains industrial machinery. (Plaintiff Dep. at 80). If a machine had a problem, for example, a millwright may be called to troubleshoot the issue and decide what trade is needed to fix the problem. (Plaintiff Dep. at 80).
7. If an employee is chosen for one of Defendant’s apprenticeship programs, Defendant pays for the required schooling and pays the employee a higher wage during his or her apprenticeship. (Deposition of Debbie Castrale (“Castrale Dep.”) at 53, Defendant’s Ex. 4).
8. Participation in one of Defendant’s apprenticeship programs is a privilege and considered to be more prestigious than working in a production position. (Castrale Dep. at 30).
9. Once an employee successfully completes one of Defendant’s apprenticeship programs, the employee is promoted, given a journeyman’s card, and considered a full-fledged

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<sup>1</sup> Plaintiff’s Appendix A contains a number of deposition exhibits. The court will cite these exhibits as “Plaintiff’s Ex. A [deposition exhibit number].”

- journeyman. (Castrale Dep. at 28).
10. To successfully complete Defendant's millwright apprenticeship program, an employee must complete 8,000 hours of on-the-job training and an additional 576 hours of technical instruction. (CBA at 78, 84, Plaintiff's Ex. A8).
  11. The parties dispute whether the 8,000-hour on-the-job-training requirement had to be completed in four years. Plaintiff argues that neither the CBA, the Apprenticeship Agreement, nor the form filed with the U.S. Department of Labor states expressly that the 8,000-hour requirement be completed within four years. (*See* CBA at 78; Apprenticeship Agreement, Plaintiff's Ex. A10; Dept. of Labor Agreement, Plaintiff's Ex. A9). Defendant argues that these forms outline a four-year period in which to complete the 8,000-hour requirement. Specifically, the Department of Labor form outlines a four-year period over which the apprentice wages increases, and the CBA states that the hours of classroom instruction completed during a year not be less than 144, which equals the required 576 over a four-year period. (*See* Dept. of Labor Agreement; CBA at 78–79).
  12. In August 2001, Plaintiff applied for Defendant's millwright apprenticeship program. (Plaintiff Dep. at 83).
  13. To apply for the program, an employee had to have less than three attendance points and be recommended by a supervisor. (Plaintiff Dep. at 80).
  14. Approximately 130 to 140 people applied for six open millwright apprenticeship positions. (Plaintiff Dep. at 81).
  15. A portion of those applicants, including Plaintiff, were sent to Ivy Tech Community College to take an aptitude test, and the top twenty-five scorers were given interviews.

(Plaintiff Dep. at 81). Plaintiff scored among the top twenty-five on the aptitude test and received an interview. (Plaintiff Dep. at 81).

16. About a week after the conclusion of the interview process, Plaintiff received a letter notifying her that she had been selected for the millwright apprenticeship program.

(Plaintiff Dep. at 82).

17. Plaintiff began working as a millwright apprentice on August 20, 2001. (Defendant's Answer to Interrogatory 7(b)).

**C. Plaintiff's Use of FMLA Leave**

18. During her employment as a millwright apprentice, Plaintiff utilized leave under the FMLA for her irritable bowel syndrome ("IBS"), severe depression, and treatment of cancer.<sup>2</sup> (Castrale Dep. at 35 59, 71).

19. Plaintiff raised concern with Rick Mayo, the apprenticeship program supervisor, regarding her ability to complete the 8,000-hour requirement in four years due to her FMLA-related absences, but he told her not to worry because she would be accommodated. (Plaintiff Dep. at 114–15; Deposition of Rick Mayo ("Mayo Dep.") at 9, Plaintiff's Ex. D and Defendant's Ex. 8).

20. Plaintiff used both continuous and intermittent leaves of absence under the FMLA. (Castrale at 35).

21. Plaintiff's use of FMLA leave was consistent but according to what her doctor had certified. (Castrale at 35).

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<sup>2</sup> While the evidence indicates that Plaintiff took some FMLA leave for treatment of cancer, Plaintiff does not elaborate on this illness nor does she claim it is a disability that Defendant failed to accommodate.

22. Plaintiff's total FMLA leave usage during her millwright apprenticeship is as follows: 8 hours in 2001 (from August 20 through December 31, 2001); 366.1 hours in 2002; 477.5 hours in 2003; 447.8 hours in 2004; 496.2 hours in 2005 (from January 1 through August 22, 2005). (Castrale Dep. at 36–38). Her total FMLA usage during her time as an apprentice equaled 1,795.6 hours. (Castrale Dep. at 38).
23. Right before her removal from the apprenticeship program, Plaintiff was on FMLA leave from July 21 through July 28, 2005, and on August 1, 2005. (Detail Labor Report for Anna Dillbeck ("Plaintiff Labor Report") at WP 000445, Plaintiff's Ex. L).

**D. Plaintiff's Removal from the Millwright Apprenticeship Program**

24. On August 4, 2005, Plaintiff was officially removed from the millwright apprenticeship program because she failed to meet the 8,000-hour on-the-job training requirement. (Removal Letter, Plaintiff's Ex. A26; August 4, 2005, Email, Plaintiff's Ex. A29; Castrale Dep. at 44).
25. When Plaintiff was removed from the apprenticeship program, she returned to production. (Removal Letter). As a result, Plaintiff's pay was cut from \$18.07 per hour to \$15.54 per hour. (Plaintiff Labor Report at WP 000445–446).<sup>3</sup>
26. At the time Plaintiff was removed from the apprenticeship program, she had completed approximately 6,100 hours of the 8,000-hour requirement. (Defendant's Answer to Interrogatory 4).<sup>4</sup>

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<sup>3</sup> This labor report shows that when Plaintiff first returned to production, she earned a wage of \$15.54/hour, but shortly thereafter, her wage increased to \$16.04/hour. (Plaintiff Labor Report at WP 000446).

<sup>4</sup> Defendant argues in its brief that Plaintiff had completed only 6,056.1 hours of the 8,000-hour on-the-job training requirement, citing two labor reports tracking Plaintiff's hours

27. Although approximately 1,800 of the hours Plaintiff was short was due to her FMLA leave, Defendant also points to the fact that Plaintiff did not accept all overtime assignments during her apprenticeship and that she went to school during work hours. (Plaintiff Dep. at 132; Deposition of Ron Jenkins (“Jenkins Dep.”) at 22, Plaintiff’s Ex. G and Defendant’s Ex. 7). However, Plaintiff responded that she could not always accept overtime when it was offered because she would be ill or she was too busy with school. (Plaintiff Dep. at 102). For example, during her first two years of the apprenticeship, she worked almost 300 hours of overtime. (Labor Report, Ex. 5 to Castrale Dep. attached as Defendant’s Ex. 4). She also responded that all the apprentices attended school during work hours because many of the required classes were only offered during the apprentices’ scheduled work hours. (Plaintiff Dep. at 174; Affidavit of Anna Dillbeck at ¶ 1, Plaintiff’s Ex. J<sub>2</sub>).<sup>5</sup>
28. Plaintiff’s four-year anniversary date in the apprenticeship program was August 22, 2005 (even though she was removed from the program on August 4, 2005). (Deposition of Jeff Bixby (“Bixby Dep.”) at 12, Plaintiff’s Ex. H and Defendant’s Ex. 9). Thus, if Plaintiff had stayed in the program until her anniversary date, the 6,100-hour figure

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worked. (*See* Exs. 4, 5 to Castrale Dep., Defendant’s Ex. 4). However, Defendant provided no guidance to the court on how it reached the 6,056.1 figure from those labor reports, and the most recent report was only run through July 25, 2005, before Plaintiff was removed from the apprenticeship program. (Castrale Dep. Ex. 4). In response to Plaintiff’s interrogatories, Castrale, under oath, answered that Plaintiff had completed “about 6,100 hours” of the 8,000-hour requirement. (Defendant’s Answer to Interrogatory 4). The court will therefore use the figure Defendant provided in response to Plaintiff’s interrogatories.

<sup>5</sup> Plaintiff’s exhibits attached to her Response to Defendant’s motion for summary judgment/Reply to her motion for partial summary judgment are cited by the exhibit letter followed by a subscript “2” to indicate that they are a part of Plaintiff’s second set of exhibits.

- would be 80 to 100 hours higher assuming Plaintiff worked full-time during that period. (Castrale Dep. at 47–48). In fact, during the period July 25 to August 22, 2005, Plaintiff worked 110 hours. (Plaintiff Labor Report at WP 000445–446).
29. Prior to her removal, Plaintiff had obtained an associate’s degree in applied science for a millwright and industrial maintenance. (Plaintiff Dep. at 42–43).
30. The ultimate decision to remove Plaintiff from the apprenticeship program was made by Deborah Castrale (“Castrale”), Human Resources/Employee Relations Manager. (Defendant’s Answer to Interrogatory 3). However, Joe West (Employee Relations Supervisor), Jeff Bixby (Employment Supervisor), and Ron Jenkins (Maintenance Superintendent) were also involved in the decision to remove Plaintiff from the apprenticeship program. (Defendant’s Answer to Interrogatory 3).
31. All of these individuals knew that Plaintiff’s shortfall in the 8,000-hour requirement was due, in part, to her taking FMLA leave. (Castrale Dep. at 61; Deposition of Joe West (“West Dep.”) at 38, Plaintiff’s Ex. E and Defendant’s Ex. 5; Bixby Dep. at 10; Ron Jenkins July 7, 2005, Email, Plaintiff’s Ex. A30).
32. On August 1, 2005, Castrale met with Wayne Porter (“Porter”), Union Steward, to discuss Plaintiff’s removal from the apprenticeship program. (Castrale Notes from August 1, 2005, Meeting (“8/1/05 Meeting Notes”), Plaintiff’s Ex. A12). Porter requested an extension for Plaintiff to complete her 8,000-hour requirement, noting that extensions had been granted in exceptional situations in the past. (8/1/05 Meeting Notes).
33. Castrale responded that Plaintiff’s situation was not exceptional. (8/1/05 Meeting Notes). Rather, the only times that Defendant had given apprentices an extension of time to

complete the 8,000-hour requirement was where those employees had been laid off and did not have the opportunity to work toward the 8,000-hour requirement. (Castrale Dep. at 57–58).

34. Specifically, Defendant identified six individuals who were given an extension to complete their apprenticeships due to a massive plant-wide layoff: Janice Winters (electrician apprentice), Theresa Colston (millwright apprentice), Russell Reeley (millwright apprentice), Dwayne Pfingston (millwright apprentice), John Baumgartner (millwright apprentice), and Joseph Leturgey (millwright apprentice). (Defendant's Answer to Interrogatory 16, Plaintiff's Ex. M). These individuals were given a one-year extension to complete their respective apprenticeships. (Defendant's Answer to Interrogatory 16).
35. On August 2, 2005, Castrale met with Plaintiff, who was represented by Porter, to inform her that she was being removed from the apprenticeship program. (Castrale Notes from August 2, 2005, Meeting ("8/2/05 Meeting Notes"), Plaintiff's Ex. A13). Castrale told Plaintiff that all apprentices were expected to complete the 8,000-hour requirement. (8/2/05 Meeting Notes). While it was unfortunate that Plaintiff had so many illnesses, Castrale stated that it would be unfair to the other apprentices to give Plaintiff an indefinite extension. (8/2/05 Meeting Notes).
36. Porter responded that he was not requesting an indefinite extension for Plaintiff but one for a reasonable amount of time. (8/2/05 Meeting Notes).
37. However, Castrale ultimately refused the request for any extension, noting that it would take Plaintiff another year to complete the 8,000-hour requirement, assuming that she had no illnesses. (8/2/05 Meeting Notes). Castrale stated that Defendant had never had a

situation where an apprentice was so far away from the 8,000-hour requirement at the end of four years without a layoff involved. (Castrale Dep. at 45).

38. Joe West stated that if Plaintiff had been “real close” to completing the 8,000-hour requirement at the end of her fourth year, he may have allowed her to complete the apprenticeship past the four-year mark. (West Dep. at 27).
39. At the same time Plaintiff was removed from the millwright apprenticeship program, another individual in that program, Paul Britt, was also removed for failing to complete the 8,000-hour requirement in four years. (Castrale Dep. at 44–45). Paul Britt had also utilized FMLA leave, although it is unclear whether his shortfall in hours was due entirely to FMLA-related absences. (Castrale Dep. at 45).
40. Defendant does not have a formal procedure for an employee to request an accommodation under the ADA. (Castrale Dep. at 11). The employee need only make his or her supervisor or someone in human resources aware that he or she has a disability (or give enough information for Defendant to understand that he or she has a disability). (Castrale Dep. at 9). Then, Defendant and the disabled person can engage in an interactive process to determine what kinds of accommodations can and need to be made. (Castrale Dep. at 9).
41. Defendant did not engage in such an interactive process with Plaintiff because, Castrale testified, Plaintiff never made Defendant aware of her disability nor did she request an accommodation. (Castrale Dep. at 9).
42. Plaintiff filed a grievance regarding her removal from the apprenticeship program, but it was denied by Joe West, Employee Relations Supervisor. (Grievance Reply, Plaintiff’s Ex. A20).

43. A production worker is more likely to be laid off than an apprentice or journeyman. (Jenkins Dep. at 17). After Plaintiff returned to production, she was laid off on January 8, 2006. (Defendant's Answer to Interrogatory 7(b)).

**E. Plaintiff's Illnesses**

**1. Irritable Bowel Syndrome**

44. Plaintiff was diagnosed with irritable bowel syndrome ("IBS") approximately nineteen years ago. (Plaintiff Dep. at 10). IBS is an incurable condition where the intestinal track is hypersensitive, which can lead to diarrhea, constipation, bloating, and abdominal discomfort. (Deposition of Kashif Iqbal, M.D. ("Iqbal Dep.") at 39, 41, Plaintiff's Ex. H<sub>2</sub>). IBS is an episodic condition. (Iqbal Dep. at 60).
45. Individuals with IBS may have periods of total incapacity, when their symptoms are at the most severe, and other periods of complete normalcy. (Iqbal Dep. at 40). When the symptoms are the most severe, an individual would not be able to work and care for himself or herself. (Iqbal Dep. at 43, 44).
46. Plaintiff's treating physician, Dr. Kashif Iqbal ("Dr. Iqbal") considered Plaintiff's IBS as a mild to moderate case. (Iqbal Dep. at 40). Dr. Iqbal defined a severe case of IBS as one where the individual had symptoms all the time; a mild case would be where an individual only has symptoms occasionally; a moderate case is somewhere in between. (Iqbal Dep. at 40).
47. In 2001, Plaintiff's IBS started getting worse. (Plaintiff Dep. at 64). She started having symptoms on a daily basis; she would go through bouts of diarrhea versus constipation; she could not be far from a toilet; and as the frequency and urgency of her condition worsened, Plaintiff, at times, lost the ability to control her bowels. (Plaintiff Dep. at 66,

70).

48. In 2002, the doctor from whom Defendant received a second opinion regarding Plaintiff's condition opined that she would miss work due to her IBS for a day or two at a time approximately every two to three weeks. (Progress Notes of Dr. Ferguson at WP 00886, Plaintiff's Ex. A6).
49. In 2003, Dr. Iqbal, in the FMLA paperwork he completed for Plaintiff, noted that Plaintiff would have a flare-up severe enough to miss work six to eight times a year. (FMLA Paperwork, Plaintiff's Ex. J). In 2004 and 2005, that number increased to three to five times a month. (FMLA Paperwork).
50. Plaintiff testified that her IBS interfered with her sleep, work, and schooling. (Plaintiff Dep. at 66). Because she has to get up to use the bathroom in the middle of the night due to her IBS, she does not get a full night of sleep. (Plaintiff Dep. at 190). During a severe flare-up, she testified that she could not lift things, bathe herself, or walk around. (Plaintiff Dep. at 188).
51. Dr. Iqbal testified that Plaintiff could care for herself and others despite her IBS, except if she were having a bad flare-up, which would usually last a couple days. (Iqbal Dep. at 43).

## **2. Depression**

52. Phyllis Cooling ("Cooling"), a certified clinical social worker at Welborn Clinic, counseled Plaintiff regarding her depression between September 2004 and August 2005. (Deposition of Phyllis Cooling ("Cooling Dep.") at 17, 18, 21, Plaintiff's Ex. I<sub>2</sub>). Before seeing Cooling, Plaintiff had been treated by two other therapists at Welborn Clinic since August 2002. (Cooling Dep. at 21–23). One of those sessions was an emergency

appointment after Plaintiff had cut her wrist after a fight with her boyfriend. (Cooling Dep. at 21–22).

53. Cooling diagnosed Plaintiff with a depressive disorder and a personality disorder. (Cooling Dep. at 33). A personality disorder is a long-standing way of approaching life that is outside the social norms that limits one life or hurts one's self or hurts others. (Cooling Dep. at 33).
54. In Cooling's opinion, Plaintiff's depression was severe but episodic. (Cooling Dep. at 98–99).
55. When she was suffering from a severe depressive episode, Cooling opined that Plaintiff could not care well for herself, but was doing some tasks of daily living. (Cooling Dep. at 97).
56. Dr. Iqbal agreed with Plaintiff's diagnosis of depression. (Iqbal Dep. at 14–15). Specifically, he diagnosed her with major depression, which is characterized as having symptoms lasting more than three to six months and symptoms severe enough that the patient may become suicidal, lose his or her appetite, and have a sleep disorder. (Iqbal Dep. at 16).
57. Plaintiff's depression became more severe in the spring of 2002, around the same time that her IBS started getting worse. (Plaintiff Dep. at 153).
58. When her depression is at its most severe, Plaintiff testified that she cannot sleep at all or sleeps all the time; she has trouble with thought processing and short-term memory loss, making it difficult for her to work; she has periods of severe weeping and hopelessness; she is unable to function as a provider for herself or others; she may fail to dress herself or wear the same clothing; she may not be able to do household chores; and her IBS

flares up. (Plaintiff Dep. at 154, 187; Cooling Dep. at 97).

59. Dr. Iqbal opined that Plaintiff would have severe depressive episodes periodically for a few days at a time. (Iqbal Dep. at 31–32). However, he stated that she was never totally incapacitated from depression while under his care nor did she ever request his approval for an extended absence from work due to her depression. (Iqbal Dep. at 33).
60. When Plaintiff was not suffering from a particular crisis episode, Plaintiff could care for herself on a day-to-day basis, do household chores, interact with others, and work. (Cooling Dep. at 83–84).
61. Plaintiff’s two conditions feed off each other—when Plaintiff is suffering from a depressive episode, her IBS flares up and when she is suffering from IBS, she is more likely to become depressed. (Plaintiff Dep. at 153).

### **3. Defendant’s Knowledge of Plaintiff’s Illnesses**

62. Joe West knew that some of Plaintiff’s FMLA-related absences were due to IBS. (West Dep. at 39). While Plaintiff never talked to him about her depression, West does recall that some of Plaintiff’s FMLA-related absences were due to her depression as well. (West Dep. at 39).
63. Castrale knew that Plaintiff suffered from IBS and knew that Plaintiff had FMLA-certified leave due to depression. (Castrale Dep. at 40, 59). However, Castrale does not recall when she learned about Plaintiff’s depression. (Castrale Dep. at 40).
64. Jeff Bixby and Ron Jenkins, two of the individuals involved in the decision to remove Plaintiff from the apprenticeship program, knew that Plaintiff suffered from IBS. (Bixby Dep. at 10; Jenkins Dep. at 13).

## **II. Summary Judgment Standard**

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of material fact exists if “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Some alleged factual dispute that does not rise to a genuine issue of material fact will not alone defeat a summary judgment motion. *Id.* at 247–48.

In deciding whether a genuine issue of material fact exists, the court views the evidence and draws all inferences in favor of the nonmoving party. *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1014 (7th Cir. 1996). However, when a summary judgment motion is made and supported by evidence as provided in Rule 56(c), the nonmoving party may not rest on mere allegations or denials in its pleadings but “must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e).

Where, as here, cross-motions for summary judgment are pending, the court evaluates each movant’s motion under the Rule 56 standards cited above, “constru[ing] all inferences in favor of the party against whom [each] motion under consideration is made.” *Metro. Life Ins. Co. v Johnson*, 297 F.3d 558, 561–62 (7th Cir. 2002) (quoting *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998)).

### **III. Discussion**

#### **A. FMLA Claims**

Plaintiff claims that in removing her from the millwright apprenticeship program,

Defendant interfered with her substantive rights under the FMLA and discriminated and retaliated against her for taking FMLA leave. The parties cross-move for summary judgment on these claims.

The FMLA establishes two categories of protections for employees. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016 (7th Cir. 2000). It both provides substantive statutory rights for employees and prohibits discrimination and retaliation by employers against employees for exercising those rights. *Id.* at 1016–17. The court addresses Plaintiff’s claims under these two categories below.

### **1. Interference with Substantive Rights**

Plaintiff claims that Defendant violated, or interfered with, her substantive FMLA rights by failing to reinstate her to the apprenticeship program after taking FMLA leave; by having the four-year policy in place, and because it considered her FMLA leave as a negative factor in its employment decision in violation of 29 C.F.R. § 825.220(c). The court discusses Plaintiff’s claims involving reinstatement to the apprenticeship program and Defendant’s four-year policy below. However, the negative factor argument is more properly addressed as part of Plaintiff’s discrimination and retaliation case, *see Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978 (7th Cir. 2008) (considering 29 C.F.R. § 825.220(c) as part of plaintiff’s anti-discrimination rights under the FMLA), and the court will address it accordingly in that section of its Entry.

The first category of protection the FMLA provides employees involves substantive rights, entitling eligible employees of a covered employer the right to take unpaid leave for up to twelve weeks in a twelve-month period for a serious health condition. *Rice*, 209 F.3d at 1016–17; 29 U.S.C. § 2612(a)(1). Upon return from leave, an employee must be returned to her position held before leave or an equivalent position. 29 U.S.C. § 2614(a)(1). To protect these

rights, the FMLA makes it “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA].” 29 U.S.C. § 2615(a)(1). However, the FMLA does not provide an employee “any right, benefit, or position of employment” to which he would not have been entitled had he not taken leave. 29 U.S.C. § 2614(a)(3)(B). Thus, an employee’s right to reinstatement is not absolute. *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 804 (7th Cir. 2001) (finding that where employee was terminated for poor performance while on FMLA leave, the employer did not violate the FMLA because she would have been fired for such performance absent her leave). In addition, an employee is not entitled to restoration where she cannot perform an essential function of the position because of a physical or mental condition. 29 C.F.R. § 825.214(b).

**a. Reinstatement**

Plaintiff in this case asserts that her substantive rights under the FMLA were violated when Defendant failed to return her to the same or equivalent position upon her return from FMLA leave. Upon returning from intermittent leave on August 2, 2005, Defendant removed Plaintiff from the millwright apprenticeship program for failing to meet the 8,000-hour requirement in four years. Plaintiff had completed approximately 6,100 hours of that requirement, had taken approximately 1,800 hours of FMLA leave during her four-year apprenticeship, and was removed from the apprenticeship program approximately three weeks before her four-year anniversary date. Thus, Plaintiff argues, if she had not taken 1,800 hours of FMLA leave, she would have met the 8,000-hour requirement by her four-year anniversary date, or said another way, Plaintiff asserts she was denied a right to which she would have been entitled, i.e. staying in the apprenticeship program, if she had not taken FMLA leave.

Defendant responds first that Plaintiff’s FMLA leave played no role in Plaintiff’s

removal from the apprenticeship program; rather, it was her hour shortage alone. Second, Defendant responds that even if Plaintiff had not taken FMLA leave and had worked the additional 1,795.6 hours towards the 8,000-hour requirement, Plaintiff would still have been short hours because 6,100 hours (actually worked) plus 1,795.6 hours (FMLA leave) only equals 7,895.6 hours, 104.4 hours shy of the 8,000-hour requirement. Assuming that Plaintiff would have worked 100 hours by her four-year anniversary date, Plaintiff would still have been 4.4 hours short of the 8,000-hour requirement. Because Plaintiff would have been short hours, Defendant argues, she still would have been removed from the apprenticeship program. Third, Defendant argues that Plaintiff failed to meet the 8,000-hour requirement in four years because she went to school during work hours and refused to accept overtime. Fourth, Defendant argues that Plaintiff was not entitled to reinstatement in the apprenticeship program, or that her removal from that program was proper, because Plaintiff could not perform an essential function of the position.

As they overlap, the court will address together Defendant's first two arguments—that Plaintiff's FMLA leave was not a factor in her removal from the apprenticeship program and that even if Plaintiff had not taken FMLA leave she would have been removed from the program. It is undisputed that Defendant's decision to remove Plaintiff from the apprenticeship program was due to her shortage of hours. The undisputed evidence also indicates that the majority of that shortage was due to Plaintiff's FMLA leave. If Plaintiff had not taken FMLA leave and had continued to work in the apprenticeship program until her anniversary date in August 2005, the undisputed evidence indicates that Plaintiff would have only been a few hours (approximately 4.4) short of the 8,000-hour requirement.

The testimony by Defendant's employees involved in the decision to remove Plaintiff

from the program indicates that Plaintiff may not have been removed if she had not been so far away from the 8,000-hour mark. Specifically, Debbie Castrale, who made the ultimate decision to remove Plaintiff from the apprenticeship program, testified that she had never had an apprentice so short of the 8,000 hours at the end of four years and that it would take Plaintiff a whole year to complete the hour requirement. Joe West, who had input in the decision to remove Plaintiff from the program, testified that Plaintiff may not have been removed if she had been really close to meeting her 8,000-hour requirement at the end of year four. From this evidence, drawing inferences in favor of Plaintiff, a jury could conclude that even if Plaintiff were shy of her 8,000-hour requirement by a few hours at the end of year four, she may not have been removed from the program. However, drawing inferences in favor of Defendant, a jury could conclude that because Plaintiff would have been short the 8,000-hour requirement at the end of year four without taking any FMLA leave, Defendant would have removed Plaintiff from the apprenticeship program. A genuine issue of material fact thus remains regarding whether Plaintiff's FMLA leave was a factor in Defendant's decision to remove Plaintiff from the program.

With respect to Defendant's third argument that Plaintiff's schooling and refusal to accept overtime contributed significantly to Plaintiff's shortfall in hours, Plaintiff testified that some of her required classes were only offered during her work hours. Further, she testified that she was unable to accept *all* of the overtime offered due to her illnesses but she did accept some overtime work during the apprenticeship program. Thus, whether these factors contributed significantly to Plaintiff's shortfall in hours remains in dispute.

Defendant last asserts that Plaintiff was not entitled to be reinstated to the apprenticeship program because she could not perform an essential function of her position. Defendant does

not expressly state which essential function of her position Plaintiff could not perform; however, it implies that completing the 8,000-hour requirement *in four years* was an essential function of a millwright apprentice. As indicated in the statement of facts, *supra*, the parties argue whether completing the apprenticeship program in four years was a requirement of the program. Plaintiff argues that the four-year requirement is not expressly stated in the CBA, the Apprenticeship Agreement, or the Department of Labor form, and is thus not a requirement at all. Defendant argues that those documents outline a four-year time span in which to complete the 8,000-hour requirement, even if they do not state it expressly, and thus completing the 8,000 on-the-job hours was an essential function of the position. Drawing inferences in favor of both parties, a jury could conclude either one. Thus, summary judgment for either party on this ground is inappropriate.

Because genuine issues of material fact remain, Plaintiff's and Defendant's motions for summary judgment on Plaintiff's claim that Defendant violated Plaintiff's substantive FMLA rights by failing to return her to the same or equivalent position are **DENIED**.

**b. Defendant's Four-Year Policy**

Plaintiff also argues that Defendant's policy of requiring completion of 8,000 hours of on-the-job training in four years on its face interferes with employees' FMLA rights because it will discourage or restrain employees from taking FMLA leave. The crux of Plaintiff's argument is that no individual who takes the total amount of FMLA leave provided by law, approximately 480 hours a year for each year of his or her apprenticeship, will be able to successfully complete the 8,000-hour requirement in four years. However, the purpose of the FMLA is not only to allow employees to take time away from work to care for themselves and/or their families but also to consider the legitimate interests of employers in accomplishing

those goals. 29 C.F.R. § 825.101(a). Under Defendant’s policy, an employee could take some FMLA leave and still complete the hour requirements of the apprenticeship in four years. The mere fact that an employee who takes all of his or her allotted FMLA leave each year of the apprenticeship may not be able to complete the program requirements, does not make the policy illegal on its face. The court is not willing to state, as a matter of law, that restrictions of time in which to complete on-the-job training requirements are illegal. Employers have legitimate interests in training their employees in a timely manner. However, simply because a policy on its face does not violate the FMLA does not mean that such a policy, in application, may not violate an individual’s FMLA rights. In those instances, the court will analyze the facts and circumstances of the particular case, as it has done here, to determine whether an employee’s FMLA rights were violated. Defendant’s motion for summary judgment on Plaintiff’s claim that Defendant’s four-year policy violates the FMLA on its face is therefore **GRANTED** and Plaintiff’s motion is **DENIED**.

## **2. Discrimination and Retaliation**

In addition to establishing substantive rights, the FMLA also prohibits an employer from discriminating or retaliating against an employee for exercising his or her FMLA rights. *Breneisen*, 512 F.3d at 978; 29 U.S.C. §§ 2615(a)(2), 2615(b). “[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions . . . .” 29 C.F.R. § 825.220(c). Further, an employer cannot retaliate against an employee for taking FMLA leave. *See Kauffman v. Fed. Express Corp.*, 426 F.3d 880, 884 (7th Cir. 2005). In the present case, it is not clear to the court whether Plaintiff asserts only a claim for retaliation or one for both retaliation and discrimination. Her brief discusses the anti-discrimination protections of the FMLA in one section and cites the retaliation framework, but

she refers to “discrimination” and “disparate treatment” interchangeably with retaliation. As the analysis for discrimination and retaliation in this case is nearly identical, the court will address both claims as one below.

To establish a case of discrimination and/or retaliation under the FMLA, a plaintiff may use either the direct or the indirect method. *Burnett v. LFW Inc.*, 472 F.3d 471, 481 (7th Cir. 2006). To establish a case of discrimination under the direct method, a plaintiff must set forth evidence that defendant subjected him or her to an adverse employment action because he or she exercised rights under the FMLA. *Breneisen*, 512 F.3d at 979. To establish a case of retaliation under the direct method, a plaintiff must show that 1) she engaged in a statutorily protected activity, 2) defendant took an adverse action against her, and 3) a causal connection exists between the two. *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007).<sup>6</sup> “Under the direct method, a plaintiff must come forward either with direct or circumstantial evidence that ‘points directly to a discriminatory reason for the employer’s action.’” *Burks v. Wis. Dep’t of Transp.*, 464 F.3d 744, 750 n.3 (7th Cir. 2006) (quoting *Blise v. Antaramian*, 409 F.3d 861, 866 (7th Cir. 2005)). “[S]uspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces [of evidence]” are examples of circumstantial evidence from which an employer’s discriminatory intent may be drawn. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

In this case, the only element of Plaintiff’s discrimination and retaliation claims in dispute is Defendant’s discriminatory intent in removing Plaintiff from the program—with

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<sup>6</sup> *Boumehdi* is a Title VII case, but cases for discrimination and retaliation under the FMLA are approached the same as those under Title VII. *See Breneisen*, 512 F.3d at 979 n.3.

respect to the discrimination claim, whether Defendant removed Plaintiff because she was an FMLA leave-taker, and with respect to the retaliation claim, whether Defendant removed Plaintiff for taking FMLA leave. Plaintiff argues the fact that Castrale admitted that Plaintiff's shortfall in the 8,000-hour requirement was due, in major part, to Plaintiff's FMLA leave is direct evidence that Defendant terminated her for taking FMLA leave. In addition, Plaintiff argues the fact that Defendant was willing to give a one-year extension to apprentices who had been laid off to complete their hours but not to her and the fact that Defendant removed Paul Britt at the same time as Plaintiff for failing to meet his hours due to FMLA leave is circumstantial evidence of Defendant's discriminatory intent.

Although Defendant vehemently asserts that it removed Plaintiff from the apprenticeship program because she did not meet the 8,000-hour requirement in four years, there is no dispute that Defendant knew that Plaintiff's shortfall in hours was due, almost entirely, to Plaintiff's FMLA leave. When Porter, Plaintiff's union steward, requested an extension for Plaintiff to complete her hours, Defendant denied that request because Plaintiff's case was not an "exceptional" case. Defendant defined "exceptional" circumstances as only those where an apprentice's serious shortfall in hours was due to a layoff, not FMLA leave. Further, the fact that Defendant removed Paul Britt from the apprenticeship program at the same time as Plaintiff for failing to complete his hour requirement in four years, which was also due in part to his taking FMLA leave, is further circumstantial evidence of Defendant's discriminatory intent. Considering this evidence in the light most favorable to Plaintiff, a jury could conclude that Defendant removed Plaintiff from the apprenticeship program because she took FMLA leave. However, in the light most favorable to Defendant, a jury could conclude that Plaintiff was removed for the sole reason of failing to meet the hour requirement, with no discriminatory

intent and regardless of the fact that she took FMLA leave. It is within the province of the jury to resolve conflicting inferences from the evidence. Summary judgment for either party is therefore inappropriate.

Rather than disputing Plaintiff's evidence under the direct case, Defendant asserts that Plaintiff fails to make her prima facie case under the indirect method of proving both discrimination and retaliation. To establish an FMLA retaliation or discrimination case under the indirect method, a plaintiff must show that after taking FMLA leave, he or she was treated less favorably than other similarly situated employees who did not take FMLA leave, even though the plaintiff was performing his or her job in a satisfactory manner. *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 951 (7th Cir. 2006). An FMLA plaintiff must show that his or her comparators were both directly comparable to him or her *and* did not take FMLA leave. *Id.* at 952.

In the present case, Plaintiff offers evidence that other millwright apprentices were given a one-year extension to complete their apprenticeships when their shortfall in hours was due to a layoff. However, as Defendant points out, Plaintiff does not present any evidence regarding these employees' FMLA leave status. Although these individuals appear to be directly comparable to Plaintiff, as they were also millwright apprentices, the court cannot determine whether they are outside of Plaintiff's protected class, a crucial element to the similarly situated prong of the indirect case. As such, Plaintiff cannot establish an indirect case of FMLA discrimination or retaliation. However, as discussed above, Plaintiff sets forth sufficient evidence to establish a direct case of discrimination and retaliation. Thus, both parties' summary judgment motions on Plaintiff's discrimination/retaliation claims under the FMLA is **DENIED**.

## **B. ADA Claims**

Plaintiff also brings claims under the ADA, asserting that both her IBS and depression constitute disabilities covered by the ADA. “The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability.” *Contreras v. Suncast Corp.*, 237 F.3d 756, 762 (7th Cir. 2001). Discrimination under the ADA may be shown in two ways: by showing a failure to accommodate or by presenting evidence of disparate treatment. *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572 (7th Cir. 2001). Plaintiff in this case asserts claims for both failure to accommodate and disparate treatment. However, to fall within the ambit of the ADA and, thus, to establish both of her discrimination claims, Plaintiff must first show that she is a qualified individual with a disability. *See Hoffman*, 256 F.3d at 572.

### **1. Qualified Individual with a Disability**

To establish that plaintiff is a “qualified individual,” plaintiff must show that she satisfies the prerequisites for the position and can perform the essential functions of the position with or without reasonable accommodation. *Hoffman*, 256 F.3d at 572. Defendant asserts here that Plaintiff is not qualified because she cannot perform an essential function of the position, namely, completing the 8,000-hour requirement in four years. However, the court held above that a genuine issue of material fact exists regarding whether completing the 8,000-hour training requirement in four years is an essential function of the millwright apprentice position. (*See* Section III.A.1.a., *supra*). Thus, Defendant is not entitled to summary judgment on this ground. The court now turns to the discussion of whether Plaintiff can establish she is “disabled” under the ADA.

The ADA defines a “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2)(A). Under this definition of disability, a plaintiff must show: 1) she suffers from a physical or mental

impairment; 2) her claimed major life activity constitutes a major life activity under the ADA; and 3) her impairment substantially limits that major life activity. *Furnish v. SVI Sys., Inc.*, 270 F.3d 445, 449 (7th Cir. 2001). This analysis requires an individualized assessment of the impact an impairment has on a person who claims to be “disabled” under the ADA. *See Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

**a. Physical or Mental Impairment**

Plaintiff argues that her IBS and depression both constitute physical/mental impairments under the ADA. The applicable federal regulations define a physical or mental impairment as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). IBS, by definition, is an impairment that affects the digestive system, and depression is a mental illness. *See Krocka v. City of Chicago*, 203 F.3d 507, 512 (7th Cir. 2000) (depression qualifies as an impairment under the ADA); *see also Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 679–80 (8th Cir. 2001) (IBS is an impairment under the ADA).

Therefore, Plaintiff satisfies the first element of the disability analysis.

**b. Major Life Activities**

Under the ADA, major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). This list is merely illustrative, not exhaustive. *Sinkler v. Midwest Prop. Mgmt. Ltd. P’ship*, 209 F.3d 678, 684 (7th Cir. 2000). A major life activity is something that is

integral to one's daily existence and "central to the life process itself." *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir. 2001) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)). "The activities that have been held to be major life activities under the ADA (e.g., eating, working, reproducing) are not the impairments' characteristics—they are *activities* that have been impacted because of the plaintiffs' impairments." *Furnish*, 270 F.3d at 450 (rejecting "liver function" as a major life activity).

In this case, Plaintiff claims that three major life activities are substantially limited by her IBS and depression: sleeping, caring for herself, and waste elimination. As the federal regulations set forth, caring for oneself is a major life activity. 29 C.F.R. § 1630.2(i). Sleeping is also considered a major life activity. *See Scheerer v. Potter*, 443 F.3d 916, 920–21 (7th Cir. 2006).

However, Defendant disputes that waste elimination is a major life activity, arguing that it is merely a characteristic of Plaintiff's IBS rather than an activity that has been impacted because of Plaintiff's IBS. The court disagrees. A hypersensitive intestinal track is a characteristic of IBS. This characteristic impacts the activity of waste elimination because the hypersensitive intestinal track causes constipation and/or diarrhea. Waste elimination is integral to one's daily existence because without the ability to eliminate toxins from the body, an individual would die. *See Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 255 (4th Cir. 2006) ("The elimination of body waste is, moreover, not only of central importance to daily life, but of life-sustaining importance. Without it, hazardous toxins would remain in the body and eventually become fatal." (internal quotations and citations omitted)). Further, while the Seventh Circuit has not specifically addressed whether waste elimination constitutes a major life activity under the ADA, several other circuits have considered the issue and determined that

waste elimination is a major life activity. *See id.*; *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 384 (3d Cir. 2004); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999). As such, the court finds that waste elimination is a major life activity.

**c. Substantial Limitation of Major Life Activities**

The court now turns to the analysis of whether Plaintiff's IBS and depression substantially limits her major life activities of sleeping, caring for oneself, and waste elimination. "[S]ubstantially limits' means that the person is either unable to perform a major life function, or is significantly restricted in the duration, manner, or condition under which the individual can perform a particular major life activity, as compared to the average person in the general population." *Contreras*, 237 F.3d at 762 (citing 29 C.F.R. § 1630.2(j)). Factors to consider in determining whether an individual is substantially limited in a major life activity are the nature and severity of the impairment, the duration of the impairment, and the permanent or long-term impact of the impairment. 29 C.F.R. § 1630.2(j)(2)(i)–(iii).

In order for an individual to establish that he or she is substantially limited in the major life activity of sleeping, he or she must present "evidence that the limitations on sleeping . . . are sufficiently prolonged, severe and long-term to warrant classification as a disability." *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 784 (7th Cir. 2007) (internal quotations omitted).

[G]eneralized assertions that [an individual] is unable to sleep for substantial periods of time, unsupported by any additional evidence, medical or otherwise, and unenhanced by claims that this lack of sleep affects [that person's] daytime functions, are insufficient to create a genuine issue of fact on [the] claim that [he or she] is disabled because of the limitations on [the] ability to sleep.

*Id.* In this case, Plaintiff asserts that her depression and IBS substantially limit her ability to sleep. Plaintiff stated that when she was having a severe depressive episode, she could not sleep at all or slept all the time. Dr. Iqbal opined that Plaintiff would have severe episodes

periodically for a few days at a time and also that a possible symptom of major depression is sleep disorder. However, there is no evidence in the record of how often Plaintiff suffered from severe depressive episodes that, as Plaintiff asserts, affected her sleep. Although Dr. Iqbal opined generally about possible symptoms of major depression, he did not opine about whether Plaintiff had a sleep disorder. The only evidence Plaintiff has that her IBS substantially limited her ability to sleep is her testimony that she would have to get up to use the bathroom throughout the night, which ultimately caused her sleeping problems. There is no evidence in the record regarding the effect Plaintiff's lack of sleep due to either her depression or IBS had on her daytime functions. Ultimately, the only evidence Plaintiff has concerning her personal problems with sleeping is her generalized assertion that she could not sleep or slept all the time during a severe depressive episode and that her IBS disrupted her sleep because she would have to get up to use the bathroom during the night. Without more, Plaintiff fails to create a triable issue of fact on her claim that her impairments substantially limit her ability to sleep.

Plaintiff next claims that her IBS and depression substantially limit her ability to care for herself. The evidence in this case indicates that during Plaintiff's severe episodes of IBS, she cannot care for herself. Specifically, Plaintiff testified that during a severe episode of IBS, she cannot lift things, walk around, or bathe herself. Dr. Iqbal agreed, testifying that Plaintiff cannot care for herself during a severe IBS episode. Further, the evidence in this case indicates that Plaintiff suffered from an IBS episode between two to five times a month. Thus, while Plaintiff's IBS may be episodic, the evidence indicates that the episodes recur frequently, are not curable, and are severe. Considering the effect of Plaintiff's IBS on her ability to care for herself when a severe episode occurs and the fact that the episodes persistently occur with severity, the court finds that Plaintiff has raised genuine issue of material fact on whether her IBS

substantially limits her ability to care for herself.

However, the evidence with respect to Plaintiff's depression is not so clear. There is no evidence how often Plaintiff suffered from a severe depressive episode. While Phyllis Cooling, Plaintiff's therapist, testified that Plaintiff could not care well for herself during a severe depressive episode, she also stated that Plaintiff could do some tasks of daily living at those times. Dr. Iqbal stated that Plaintiff was never totally incapacitated while under his care due to her depression. While Plaintiff testified that during a severe depressive episode she had trouble caring for herself, including doing household chores and getting dressed, the court finds these general assertions in light of Cooling's and Dr. Iqbal's opinions, insufficient to create a genuine issue of material fact that Plaintiff's depression substantially limits her ability to care for herself.

Plaintiff last argues that her IBS substantially limits her ability to eliminate bodily waste. As discussed above, IBS is an incurable condition that causes diarrhea and/or constipation. While Plaintiff only has a severe episode of IBS a few times a month, she testified that she has symptoms daily, requiring that she be close to a bathroom. Further, Plaintiff stated that as her IBS became more severe, she would on occasion, lose her ability to control her bowels. This evidence demonstrates that Plaintiff has serious problems eliminating bodily waste as compared to the average person. Her symptoms are persistent and can be so severe that she completely loses control over the ability to eliminate waste. As such, the court finds that Plaintiff has raised a triable issue of fact regarding the substantial limitation her IBS places on her ability to eliminate bodily waste.

Because Plaintiff has brought forth sufficient evidence for a jury to conclude that her IBS substantially limits the major life activities of caring for herself and waste elimination, Plaintiff has established for purposes of summary judgment that she is "disabled" under the ADA due to

her IBS. The court now turns to Plaintiff's two discrimination claims under the ADA—failure to accommodate and disparate treatment.

## **2. Failure to Accommodate**

To establish a failure to accommodate claim, plaintiff must show the employer was aware of her disability and failed to provide a reasonable accommodation, in addition to the initial showing that she is a qualified individual with a disability. *Hoffman*, 256 F.3d at 572. The regulations further specify that it is unlawful for an employer to fail to make reasonable accommodations to the known physical or mental limitation of an employee unless the employer can demonstrate that such accommodations would constitute an undue hardship on the business. 29 C.F.R. § 1630.9(a).

First, Defendant argues that it was not aware that Plaintiff was disabled. However, the regulations clarify that an employer must only be aware of the employee's physical or mental limitation, not necessarily that the employee was "disabled." *See id.* In this case, Defendant's representatives involved in the decision to remove Plaintiff from the apprenticeship program knew of Plaintiff's IBS. Debbie Castrale, the ultimate decision-maker, knew that Plaintiff suffered from IBS; Joe West knew that Plaintiff had taken FMLA leave for IBS; and Jeff Bixby and Ron Jenkins knew that Plaintiff suffered from IBS. The court finds that this undisputed evidence is sufficient to show that Defendant was aware of Plaintiff's physical impairment of IBS.

Defendant next argues that it did not fail to provide Plaintiff a reasonable accommodation because an indefinite extension of time to complete the 8,000-hour requirement was unreasonable and unduly burdensome and would have violated the CBA.

Reasonable accommodations may include:

“(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”

*Hoffman*, 256 F.3d at 572–73 (quoting 42 U.S.C. § 12111(9)). However, the ADA does not require employers to restructure an employee’s job and those of his or her co-workers in order to accommodate the employee’s disability. *Basith v. Cook County*, 241 F.3d 919, 929–30 (7th Cir. 2001). Allowing an employee an indefinite leave of absence is not a reasonable accommodation. *Nowak v. St. Rita High School*, 142 F.3d 999, 1004 (7th Cir. 1998). Defendant bears the burden to prove that the employee’s suggested reasonable accommodation will create an undue hardship on Defendant. *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002).

There is no dispute in this case that Plaintiff requested an accommodation for her disabilities, as she spoke to Rick Mayo, the apprenticeship program supervisor, regarding an accommodation and Porter, Plaintiff’s union steward, requested an accommodation from Castrale upon learning that Defendant was going to remove Plaintiff from the apprenticeship program. Rather, the issue here is whether Plaintiff’s request for a reasonable extension of time in which to complete her remaining 1,900 hours of on-the-job training was a *reasonable* accommodation. While Defendant likens this extension of time to an indefinite absence, the court finds that giving Plaintiff a reasonable amount of time in which to complete her on-the-job training hours, which would have taken approximately one year, is distinguishable. By definition, Plaintiff was not requesting an indefinite extension, she was requesting an extension

to complete 1,900 training hours. Further, the fact that Defendant had allowed one-year extensions to complete the apprenticeship program in the past indicates to the court that a one-year extension for Plaintiff was not wholly unreasonable.

The court finds little merit in Defendant's argument that such an extension in Plaintiff's case would constitute an undue hardship or force Defendant to violate the CBA. Defendant argues that giving Plaintiff an extension would constitute an undue hardship because it would force Defendant to create a new journeyman position where none is needed. Plaintiff had already been accepted into the apprenticeship program, had completed three-fourths of the on-the-job training hours, and had completed all the classroom requirements to finish successfully Defendant's millwright apprenticeship program. Defendant's plan for the apprentices it accepted into the relevant apprenticeship programs was for those employees to become full-fledged journeyman. In essence, Defendant created a position for Plaintiff as a millwright journeyman when it accepted her into the millwright apprenticeship program. There is no evidence that any other journeyman has taken the position to which Plaintiff would have been entitled upon successful completion of her apprenticeship. Rather, Defendant would have had to expend funds to train and educate a new millwright apprentice to take that position, while wasting all the funds it expended on Plaintiff.

The court also finds little merit in Defendant's argument that giving Plaintiff an extension would force it to violate the CBA. The CBA does not expressly state that the 8,000-hour on-the-job training requirement be completed in four years. While Defendant argues that past practice has made the four-year requirement part of the CBA, the court disagrees. Other apprentices were given extensions of time in which to complete their on-the-job training. Defendant's past practice thus indicates that extensions were given in select situations.

Providing Plaintiff an extension of time would not have required Defendant to violate the terms of the CBA. For the above-stated reasons, the court finds that Plaintiff has raised a triable issue of fact on whether Defendant failed to provide her a reasonable accommodation.

Plaintiff also argues that Defendant's failure to engage in the interactive process resulted in its failure to provide a reasonable accommodation. The ADA envisions a flexible interactive process between an employer and a disabled employee in arriving at an appropriate reasonable accommodation for the employee. 29 C.F.R. § 1630.2(o)(3). However, potential liability for failure to engage in the interactive process only attaches where an employee alleges that the result of the breakdown was the employer's failure to provide a reasonable accommodation. *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000). In this case, Plaintiff's union steward requested an extension of time for Plaintiff to complete her hours and Defendant's response was simply that it would take too long. The record is devoid of any meaningful interaction between Defendant and Plaintiff (or her representative) to arrive at a reasonable accommodation for Plaintiff. While the court has held above that Plaintiff creates a triable issue regarding Defendant's failure to provide Plaintiff a reasonable accommodation, the court also finds that Plaintiff has created a triable issue as to whether Defendant's failure to engage in the interactive process resulted in that failure to provide a reasonable accommodation. For these reasons, Defendant's motion for summary judgment on Plaintiff's failure to accommodate claim is therefore **DENIED**.

### **3. Disparate Treatment**

While it purports to move for summary judgment on the entirety of Plaintiff's complaint, including both of her ADA discrimination claims, Defendant does not address Plaintiff's disparate treatment claim in its Brief in Support. In its Reply, Defendant dedicates a footnote to

Plaintiff's disparate treatment argument, which Plaintiff set forth in her Response. Defendant argues in its Reply that because Plaintiff cannot show that she is a "qualified individual" or "disabled" within the ambit of the ADA, Plaintiff's disparate treatment claim fails as a matter of law. Arguments raised in a party's reply brief but not in the moving brief are waived. *Praigrod v. St. Mary's Med. Ctr.*, No. 3:05-cv-166-JDT-WGH, 2007 WL 178627, at \*3 (S.D. Ind. Jan. 19, 2007) (citing *Marie O. v. Edgar*, 131 F.3d 610, 614 n.7 (7th Cir. 1997)).

Further, in the footnote in its Reply regarding Plaintiff's disparate treatment claim, Defendant does not address the third element of Plaintiff's disparate treatment claim—that she suffered an adverse employment action due to her disability—and relies solely on the argument that Plaintiff cannot establish she is a qualified individual with a disability. *See Furnish*, 270 F.3d at 448 (setting forth the elements to establish an ADA disparate treatment claim).

Arguments not adequately developed or supported are waived. *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000). The court held above that Plaintiff has established a genuine issue of material fact regarding whether she is a qualified individual with a disability under the ADA. Because Defendant technically waived its argument concerning Plaintiff's disparate treatment claim by not raising it in its Brief in Support and failed to address the third element of that claim in its Reply, Defendant's motion for summary judgment on Plaintiff's disparate treatment claim under the ADA is **DENIED**.

#### **IV. Conclusion**

For the reasons set forth above, Plaintiff's motion for partial summary judgment (Docket # 34) and Defendant's motion for summary judgment (Docket # 52) are **DENIED** in their entireties.

**SO ORDERED** this 24th day of July 2008.

s/ *Richard L. Young*

RICHARD L. YOUNG, JUDGE  
United States District Court  
Southern District of Indiana

Electronic copies to:

Andrew Dutkanych III  
BIESECKER & DUTKANYCH LLC  
ad@bdlegal.com

Veronica Li  
LITTLER MENDELSON, P.C.  
vli@littler.com

Garrison L. Phillips  
LITTLER MENDELSON, P.C.  
gphillips@littler.com